Respectfully submitted,

KENNETH P. JACOBUS
509 Third Avenue
Anchorage, Alaska 99501

Attorney for Petitioners,
Alaska Helicopters, Inc. and
General Electric Company

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 1805

ALASKA HELICOPTERS, INC., *Petitioner,*

v.

LESTER M. ANDERSON, *Respondent.*

Order

It is ORDERED:

1. The Petition for Review is denied.

2. The superior court may consider this case further to determine whether, pursuant to Rule 95, Rules of Civil Procedure, costs and attorney's fees should be imposed upon the counsel who acted for respondent in the superior court.

3. The superior court may also consider whether the conduct of counsel for the respondent in the superior court was such as to warrant referral of the matter to the Alaska Bar Asociation for appropriate investigation and disciplinary action.

BY DIRECTION OF THE COURT.

DATED this 28th day of June, 1973.

/s/ JOSEPHINE M. MCPHETRES
Josephine M. McPhetres
Clerk

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 70-2395

LESTER M. ANDERSON, *Plaintiff*,

vs.

ATLANTIC RICHFIELD COMPANY,
AND ALASKA HELICOPTERS, INC., *Defendants*.

Order Granting Reinstatement of Cause

The history of this case has been heard at previous hearings, but for the sake of brevity the matter here was dismissed on July 12, 1971.

On September 10, 1971, the plaintiff moved to reinstate, which the Court denied. A rehearing was moved and heard on October 15, 1971, at which time the Court advised the plaintiff reinstatement would not be considered unless certain answers to interrogatories were first filed. Some time in November, 1971, certain certain answers were filed, but no further action was noted until July 11, 1972 when plaintiff again moved for reinstatement, this time being represented by Floyd Smith.

A hearing was scheduled and heard on August 8, 1972. Mr. Curran, who had previously represented the plaintiff, advised he would be out of town that date and requested a continuance. Since the matter had been previously scheduled at least once, and continued, the Court denied the continuance, allowed argument, but gave Mr. Curran until August 11, 1972 at noon to file or submit anything he wished considered. Nothing was filed or submitted.

After a thorough review of the file, it appears that plaintiff may not have been advised of all that transpired in the case, or counseled on all that was necessary. To deny his motion would be manifest injustice.

Defendant, however, is entitled to reasonable compensation for the delay caused by Mr. Curran is not conforming to orders issued by this Court. Accordingly, defendant's attorney is advised to set a hearing with reasonable notice to Mr. Curran so that the Court may determine how much of the amount posted in the form of a bond shall be awarded to defendant for costs and attorney's fees caused by the delay involved.

DATED at Anchorage, Alaska this 17th day of August, 1972.

/s/ C. J. OCCHIPINTI
C. J. Occhipinti
Superior Court Judge

APPENDIX C

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 1819

STATE OF ALASKA, *et al, Petitioners,*

v.

MILLICENT JENNINGS,
As Administratrix Of The Estate Of
STEVE GANUELAS AND VICTORIA A. VELASCO,
et al, Respondents.

IT IS ORDERED:

1. The Petition for Review is denied.

2. The superior court may consider this case further to determine whether, pursuant to Rule 95, Rules of Civil Procedure, costs and attorney's fees should be imposed upon the counsel who acted for respondent in the superior court.

3. The superior court may also consider whether the conduct of counsel for the respondent in the superior court was such as to warrant referral of the matter to the Alaska Bar Association for appropriate investigation and disciplinary action.

By Direction Of The Court.

Dated this 28th day of June, 1973.

/s/ Josephine M. McPhetres
Josephine M. McPhetres
Clerk

APPENDIX D

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 70-1966 A

Millicent Jennnings, *etc., et al., Plaintiffs,*

v.

State Of Alaska and
General Electric Company, *Defendants*

Order

This case came on to be heard on the plaintiffs' motion for relief from final judgment on September 21, 1972. After due consideration,

It Is Hereby Ordered that plaintiffs' motion for relief from judgment is granted, and the above-entitled action is reinstated as to the plaintiffs Simeon Tinagen, Ted Oreiro, Arturo Quebral, Millicent Jennings as Administratrix of the Estate of Victoria A. Velasco, and Nakat Packing Company subject to the following conditions:

1. The attorneys for each defendant shall prepare time billings for work done in preparation for this motion and

submit same to the Court and to the attorneys for the plaintiffs. Plaintiffs shall not be allowed to proceed with this action unless the same bills are paid upon approval by the Court.

2. If any of defendants' interrogatories presently of record in this case have not been answered, plaintiffs will have 30 days, i.e., until October 24, 1972, in which to answer said interrogatories.

3. The material requested in defendant General Electric Company's motion to produce filed August 19, 1970, and the material requested in defendant General Electric Company's motion to produce dated December 2, 1970, and in defendant State of Alaska's motion for production dated March 19, 1971, shall be provided to all defendants requesting same within 30 days, i.e., by October 24, 1972. In the event that plaintiffs are unable to provide any of the material requested in the above motions to produce, plaintiffs shall make a showing that said material is unavailable to the plaintiffs and cannot be located and produced through the exercise of due diligence.

4. All other outstanding attorneys' fees due and owing to the attorneys for the defendant General Electric Company shall be paid before further proceedings are held in this action.

Subject to the above conditions,

IT IS ORDERED, ADJUDGED and DECREED that the motion of the plaintiffs to reinstate the above-entitled action as to plaintiffs Simeon Tinagen, Ted Oreiro, Arturo Quebral, Millicent Jennings as the Administratrix of the Estate of Victoria A. Velasco, and Nakat Packing Company is granted.

DONE this 6th day of October, 1972.

/s/ EDWARD V. DAVIS
Edward V. Davis
Superior Court Judge

APPENDIX E

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 69-2870

JOHN D. SCHANDELMEIR, *Plaintiff*,

vs.

WINCHESTER WESTERN, A DIVISION OF OLIN MATHIESON, A CONNECTICUT CORPORATION, *Defendant*

Order Denying Motion to Vacate Order Denying Motion to Set Aside Judgment of Dismissal

DISCUSSION

Proceedings to Date:

Plaintiff filed his complaint on October 20, 1969, alleging in substance that he owned a Winchester Model 70 Rifle, Serial Number 103398, Calibre 300 H & H magnum which exploded on August 11, 1968, while being used by him on a hunt. Plaintiff allegedly suffered personal injuries from the explosion which he alleges could be traced to a defect in the rifle existing at the time of manufacture. Defendant's claims were in tort alleging strict liability and under the U.C.C. alleging breach of implied warranty.

Defendant attempted to remove the case to Federal District Court but it was remanded by the court on December 16, 1969.[1]

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[1] Judge Plummer, by opinion dated November 24, 1969, indicated that plaintiff's complaint demanded an amount "in excess of $3,000" which did not meet the Federal court's jurisdictional amount, i.e. $10,000. Plaintiff no doubt relied upon *Miller* v. *Johnson*, 370 P.2d 171, 172 (Alaska 1962); *Wilson* v. *Interior Airways*, 384 P.2d 956, 958-959 (Alaska 1963) and Civil Rule 54(c) for the proposition that no monetary relief need be plead under Alaska practice.

Defendant answered generally denying the allegations of the complaint and affirmatively alleging that weapons of the class mentioned in the complaint were manufactured just after the Second World War and had thus been in circulation for over 25 years precluding, as a matter of law, the imposition of strict liability or a finding of breach of commercial code warranty.

The parties engaged in discovery during 1970. On October 27, 1970, in response to an interrogatory, plaintiff informed defendant that the only eye witness to the accident was one John C. Schandelmeir, plaintiff's son. Defendant thereafter, on April 7, 1971, noticed the deposition of plaintiff and his son for April 22, 1971. The son was properly subpoenaed on April 13, 1971.

On July 14, 1971, defendant moved to dismiss the complaint. The deposition of plaintiff and his son were continued a number of times. Plaintiff's attorney, by letter dated April 22, 1971, warranted that plaintiff and his son would be present on May 3, 1971. Apparently they were not. The motion to dismiss apparently resulted in an agreement whereby plaintiff's deposition was to be taken September 3, 1971, and apparently it was.

The case was assigned to me on January 25, 1972, and the trial set for May 8, 1972, a day certain.

Further efforts were made to take the son's deposition resulting in his being successfully subpoenaed on February 2, 1972. The deposition was not taken at that time or at several later times at which it was re-scheduled.

Defendant moved to dismiss the complaint on March 3, 1972, alleging in substance that plaintiff had conspired with his son to thwart discovery. The motion was noticed for hearing on Monday, March 20, 1972, at 1:30 p.m. Under Rule 77(e)(2) opposition was due two court days prior

to the hearing, or on Thursday, March 16, 1972.[2] It is the Superior Court's practice to have the court attorneys monitor motion practice. If timely opposition is not filed, the relief requested is treated as having been the subject of a stipulation and the moving party's attorney is requested to submit an appropriate order (Civil Rule 77(f)(2)). The record reflects that a court attorney called Mr. Clark on March 17, 1972, and requested that he submit an order. This court entered its judgment of dismissal on March 29, 1972. On April 17, 1972, (eleven days before the final day to notice an appeal—April 28, 1972), plaintiff filed a motion to vacate the judgment and for relief from judgment pursuant to Civil Rule 60(b)(6). No mention is made in that motion of any alleged mistake of law. The grounds for the motion and the reasons for my ruling denying it are fully set out in my decision dated July 13, 1972, and will not be repeated here.

On August 10, 1972, one day before the time to appeal this court's order denying Rule 60 relief ran out, plaintiff filed its present motion to vacate that order. In substance, plaintiff alleges that this court committed a mistake of law in dismissing the complaint on March 29, 1972.

Defendant counters that this matter in on appeal and consequently this court lacks jurisdiction to consider this motion. I have concluded under the rationale of *Fischback and Moore of Alaska, Inc.* v. *Lynn*, 407 P.2d 174, 176 (Alaska 1965), that my ruling upon this motion would not amount to a conflict with the jurisdiction of the Supreme Court, and that consequently I have jurisdiction. Cf. Supreme Court Rule 9(a)(3).

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[2] In determining when opposition is due, Rule 77(e)(2) requires that one begin with the day of hearing and count back two days. In computing time, Rule 6 indicates that the date from which time is computed is disregarded as well as the final date if it is a court holiday. In any event, when the time allowed is less than 7 days (here two days is specified), all intervening Saturdays and Sundays are disregarded.

I have not been cited to an Alaska decision applying Rule 60(b)(6) to a fact situation similar to the instant case. In the federal courts, the comparable Civil Rule 60(b)(6) applies only to those situations not covered by 60(b)(1-5)[3] and like them, is not a substitute for appeal.[4] Alaska Civil Rule 60(b)(1) refers to:

> "(1) mistake,[5] inadvertence, surprise or excusable neglect;"

Thus, while mistake of law can be raised by Rule 60 motion, it must be raised within the thirty days following the judgment, here dated March 29, 1972, allowed for appeal,[6] e.g. by April 28, 1972. Since the first claim of mistake of law in this case was made on August 10, 1972, it is untimely and must be disregarded. Nevertheless, a few comments are in order.

Implicit in the motion is a misunderstanding of Rule 77 and the part it is intended to play in Superior Court practice. A hearing properly conducted gives the court an opportunity to thoroughly discuss the relevant law and facts with counsel to insure that it fully understands the dispute presented before it rules. In order to carry on such a dialogue, the court must be thoroughly prepared, i.e. must have read the authorities cited and usually carried out substantial research of its own, particularly if one side is poorly presented. If the court waits until after the hearing to prepare, it loses the benefit of this dialogue with

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[3] *Moore's Federal Practice* (2nd Ed.) ¶ 60.27[2] at 352-353 (1971).

[4] *Ibid.*

[5] At one time it was thought that "mistake" applied only to the moving party. Now, the prevailing view allows use of Rule 60(b)(1) to raise mistakes of law by the court, d. ¶ 60.22[3] at page 258.

[6] *Ibid.*, ¶ 60.22[4] at 267-268.

counsel and unreasonably delays its decision. Where, however, the court takes this time to prepare only to discover that the motion is unopposed, i.e. both parties agree that it be granted or that the case has settled, the court's time has been wasted and, more important, other cases in which real disputes exist are deprived of that time and are either decided upon an inadequate record or continued, thereby creating a backlog and delaying justice.

To avoid this problem, the Supreme Court enacted Rule 77(e) and (f) which have no counterpart in the Federal Rules. Under Rule 77, a party against whom a motion has been made has two options, either of which must be done two trial days before the hearing. He may (1) oppose the motion in writing [Rule 77 (e)(2)(a)] or (2) signify that he does not oppose the motion [Rule 77(e)(2)(b)]. If he does neither, he will be treated as having consented that the motion be granted, id. 77(f)(2).[7] It should be noted that this is far more than a waiver of opposition; it is a finding of affirmative consent, i.e. that the relief requested by the motion was the subject of a stipulation. In this way, the court can plan its research to only cover those issues truly disputed.

While it might seem that no one would intentionally fail to oppose a dispositive motion (one for summary judgment or to dismiss), this is not true. Dispositive motions are most often made either in cases in which one party is weak on the facts or the law, or one in which the law is unsettled and the outcome uncertain. These are cases most likely to be settled. Thus, absent Rule 77, a court would frequently thoroughly research the often complex legal problems upon which a dispositive motion was based only to discover at the hearing that the case was settled

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[7] I realize that Rule 77(f)(2) gives the court discretion not to treat the motion unopposed, but the burden should be on the party failing to comply to justify the exercise of that discretion in his favor by, for example, a motion pursuant to Rule 6 for additional time.

in the interim. Enforcement of Rule 77 is the only way to insure that limited judicial time is properly allocated to truly disputed issues.

No injustice is worked by this procedure. If a party has inadequate time to prepare, he may move (either before or after the time runs) for additional time. See Rule 6(b). If judgment is entered due to excusable[8] or even inexcusable[9] neglect, it may be reinstated on an appropriate showing, but the burden to make that showing must be placed on the party violating Rule 77. The reason for this should be clear.

The Supreme Court has many times pointed out the importance of requiring counsel and parties to comply with court rules in order to expeditiously process cases to final judgment on the merits. Civil Rule 1, and see *Ketchikan Cold Storage Co.* v. *State of Alaska,* 491 P.2d 143 (Alaska 1971). Nevertheless, the court has been equally concerned to avoid use of the rules to unfairly deprive a party of his day in court, and thus requires evidence or wilful violation of court rule or order before an action can be dismissed, default entered, a fine imposed, or facts established by a preclusion order. Similarly, a showing that a violation of court rule or order was "without substantial justification" is required in order to impose costs (I assume that this is the same as inexcusable neglect in Rule 60 practice) (*ibid.*).[10]

While fair in theory, this gloss of the rules is difficult of practical application since the complaining party and the

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[8] Civil Rule 60(b)(1).

[9] Civil Rule 60(b)(6); see 7 *Moore's Federal Practice,* ¶ 60.27[2], pp. 365-374.

[10] Some sanction must be imposed or the rules will continue to be ignored. Generally, three types of sanctions have been suggested for rule violations:

(1) Dismissal of the claim where a plaintiff is at fault or the striking of the answer and entry of default where a defendant is

court rarely know why the defaulting party failed to obey the court rule or order. Only the defaulting party knows why he did what he did or failed to do what he did.

Therefore, I have determined to place the initial burden of establishing a violation of court rule or order on the complaining party, but shift the burden of negating wilful violation and establishing substantial justification on the

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at fault. See Civil Rule 37 and 41. These and preclusion orders are the most serious sanction.

(2) A fine levied against the offending party or his attorney. See Rule 90; as 09.50.010(3)(5) and (9). Where the attorney is at fault, a fine is the sanction *Moore* recommends. See 7 *Moore's Federal Practice*, ¶ 60.27[2], text accompanying n.47 at 369; *Mely* v. *Morris*, 409 P.2d 979, 983 (Alaska 1966).

(3) The imposition of costs on the offending party or his attorney. See Civil Rule 95.

The Supreme Court requires a finding of "wilfulness" before a case may be dismissed, (*Oaks* v. *Rojcewicz*, 409 P.2d 839, 840 (Alaska 1966); *Mely* v. *Morris*, 409 P.2d 979, 982 (Alaska 1966)), or a fine imposed, (*Taylor* v. *District Court for the Fourth Judicial District*, 434 P.2d 679 (Alaska 1967)). It is strange that in *Oaks, supra*, and *Mely, supra*, a violation of court rule is free from wilfulness only if the violator was unable to comply for reasons beyond his control, thus, consistent with those decisions, a case could be dismissed where the violator had the ability to comply but negligently failed to do so since neglect (or at least inexcusable neglect) is "fault." In *Taylor, supra*, however, the court put a much more restrictive definition on the word "wilful" where the levy of a nominal fine ($100) against an attorney was involved, for there the attorney clearly had the ability to comply with Rule 40(f)(2) as supplemented by Rule 6(b), i.e. he could have made a motion on short notice for a continuance but failed to do so. While the trial court could have ignored a secretary's oral request for a continuance by phone and compelled the defendant to go to trial if a civil case (see *Gregoire* v. *NBA*, 413 P.2d 27, 33-36 (Alaska 1966)) or issued a bench warrant for the defendant if a criminal case, it nevertheless did what *Moore* suggested and focused attention on the guilty attorney only to be reversed. Thus, *Taylor* stands for the proposition that the court cannot fine an attorney (and by implication, his client) for even in-

defaulting or disobeying party. This, I fee, will vindicate court rules and orders while preserving the rights of both

excusable neglect, thus overruling *Mely* sub silentio on this point and leaving the trial court with no meaningful sanctions to impose for inexcusable neglect.

Assessment of costs or attorney's fees pursuant to Rule 95 is worthless, first, because the victim of rule violation is the court system and the public at large, including the parties in other matters whose cases are unnecessarily delayed, as much as the defaulting party's opponent, and there is no method for calculating cost to the court; second, the actual costs traceable to rule violation are rarely capable of measurement even as regards the opposing party; third, this is a small community, counsel must live and work together, and to do so, they must get along; it is an unwritten rule in general operation in this district that where the court, in attempting to enforce its rules, assessed costs or attorney's fees pursuant to Civil Rule 95, the party in whose favor the court acts shows his generosity by (off the record) forgiving the assessment and relieving the offending attorney or his client of the need to pay. The bar association for good reason or bad will not police its members. Finally, a large percentage of litigants are either judgment proof or have their assets concealed, rendering collection of costs impossible. In any event, the cost of collection would in most cases exceed the costs collected. Predicating a dismissal upon failure to pay costs raises substantial constitutional questions, (see *Mely* v. *Morris, supra*) and the true deadbeat has all the appearance of an indigent.

Finally, dismissal without prejudice or placing a case at the foot of the calendar can be a sanction in some jurisdictions with a year or two backlog of cases ready for trial; here, however, any case in which counsel are prepared can be tried within a short time after filing. If cases are delayed beyond that, it is because one or both counsel wish a delay. Thus, dismissal without prejudice is a benefit rather than a sanction to dilatory or careless parties and counsel since it allows the case to remain in limbo for an entire year (see AS 09.10.240), or to be refiled at any intervening time at the defaulting party's whim. It is in practice merely a continuance.

In summary, since rule violations are most often the result of indifference, carelessness and negligence rather than wilfulness, and the trial calendar is so flexible that dismissal without prejudice is more often a reward than a sanction, neither Rule 90 nor Rule 95 provides a viable answer to rule violation.

parties to fair resolution of their conflicting claim. See *Johanson* v. *State*, 491 P.2d 759, 766-767 (Alaska 1971).

Besides developing the facts necessary to a proper resolution of the issue of rule or order violation, this procedure, by placing the burden and the expense of justifying rule or order violation on the offending attorney or party, will serve to bring home to both the seriousness of the problem and the necessity of substantial compliance with court rules and orders.

Implicit in the foregoing is assurance that all unexcused violations of court rules and orders brought to this court's attention will be sanctioned and that the seriousness of the sanction (whether dismissal, default judgment, assessment of costs, or imposition of fine for contempt of court) will turn on the explanation for the volation. In determining culpability, the court will consider whether the party defaulting made reasonable efforts to seek an extension of time or otherwise alert the opposing party of a probable violation of rule or order so that the latter could minimize resulting cost or damage. Applying this test to the instant case, I find a properly noticed motion to dismiss requesting intelligible relief and allowing 17 days' notice. I find from the supporting papers a strong, though by no means conclusive, inference of plaintiff's violation of the court's discovery rules in connection with the deposition of his son. (The alleged rule violation, i.e. failure to make discovery, is clear; it is the basis for the motion to dismiss, i.e. whether Civil Rule 37(d) or 41(b), that leaves me in some doubt.)[11] This question was mooted in this case by plain-

[11] Plaintiff never questioned the legal basis for this court's ruling until his most recent motion and has probably waived that issue. In any event, error in this court's ruling was proper for appeal, not a Rule 60 motion. See 7 *Moore's Federal Practice*, Rule 60(b)(6) *passim*; see *Moore* op. cit. ¶ 60.30[3] text accompanying n.8 at 431. *Moore* states that a party may not complain of alleged errors of law by the court after the time for appeal has run by means of a Rule 60 motion. See *Moore* op. cit. ¶ 60.22[3] *passim*, esp. text accompanying note 4 at p. 268.

tiff's failure to file timely opposition which, in the absence of an explanation, is the equivalent of stipulating to the relief requested. See Civil Rule 77(f)(2). Regardless, I believe that Mr. Clark did make a sufficient showing to shift the burden to plaintiff to explain, if he could, the difficulties that apparently attended the deposition of his son. In any event, plaintiff clearly violated Supreme Court Rule 77(e)(2), justifying this court in presuming a waiver of any opposition to the motion to dismiss. Civil Rule 77 (f)(2).[12] Once the motion was granted and judgment of dismissal entered, the plaintiff had two options: (1) a timely appeal or (2) a motion for relief from judgment pursuant to Rule 60. Plaintiff chose the latter and, therefore, it was incumbent upon plaintiff in that motion for relief from judgment to show fully "(1) mistake, inadvertence, surprise or excusable neglect;" and completely explain the various rule violations alleged and particularly, his failure to comply with Civil Rule 77(e)(2). This has never been done. Brushing aside plaintiff's rather tenuous argument that filing opposition to a motion to be heard on that Monday can somehow comply with Rule 77(e)(2), we are left with no explanation whatsoever why plaintiff did not file timely opposition two full court days prior to the Monday hearing, i.e. on the preceding Thursday, as is required by Civil Rule 77(e)(2), cf. Civil Rule 6(a). The

[12] I realize that finding consent and treating the relief requested in the motion as the subject of a stipulation is discretionary (see *Channel Flying, Inc.* v. *Bernhardt*, 451 P.2d 570, 572 (Alaska 1969), but the burden is upon the defaulting party to convince the court that it should not find a consent. The Rule 60(b) motion gave plaintiff the opportunity. In order to sustain that burden, plaintiff must establish (1) that he did not, in fact, consent or stipulate to dismissal; (2) that failure to file timely opposition was the result of 'mistake, inadvertence, surprise or excusable neglect;" and (3) that the opposition, if timely filed, was meritorious. Conceding that the first point has been established, no attempt has been made to show the second. Plaintiff has failed to establish excusable neglect.

hearing date is the event from which time must be calculated but Civil Rule 6(a) provides that where the period allowed is less than seven days, intervening Sundays and court holidays are excluded. Here, the two days are for the benefit of the trial court to enable it to adequately prepare for the hearing. Since Saturday is a court holiday, it follows that reading Rule 77(e)(2) and 6(a) together, where a motion is to be heard on Monday, opposition must be filed no later than the preceding Thursday to be considered unless additional time is obtained pursuant to Civil Rule 6(b). (No application pursuant to Civil Rule 6(b) has ever been made by plaintiff nor has an explanation ever been offered explaining why opposition was not timely filed.) This, despite the fact that plaintiff has brought both a motion for relief from judgment and a motion to vacate this court's denial of that motion subsequent to the time this court, in reliance on Rule 77(e) and (f)(2), dismissed the claim. The only legitimate conclusion that I can draw is that there is no explanation and, therefore, no basis for relief under Rule 60(b). Plaintiff's suggestion that the interplay between Rule 77(e)(2) and Rule 6(a) is ambiguous might justify relief if plaintiff contended that either he or his attorney were mislead by the ambiguity. See *Aleutian Homes* v. *Fischer*, 418 P.2d 769,773 (Alaska 1966). No such claim is made.

In reaching this conclusion I have not overlooked the preference previously indicated for resolution on the merits (*Oaks* v. *Rojcewicz*, 409 P.2d 839 (Alaska 1966); see 7 *Moore's* Federal Practice, ¶60.27[2] at 362-363), or the distinction between Rule 60(b)(1) and 60(b)(6).[13]

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[13] See *Moore*, op. cit. ¶ 60.27[2] text accompanying n.23 at 361. Generally, Rule 60(b)(6) is a catchall covering those situations not governed by Rule 60(b)(1-5). Motions to set aside judgments by default or by dismissal are generally covered by Civil Rule 60(b)(1), see *Moore*, op. cit. ¶ 60.27[2] pp. 362-363 but cf. *id.* at 366. Here we do not know the precise basis for the relief claimed and cannot determine whether the motion is truly a (b)(1) or (b)(6) motion.

Finally, I am operating on the assumption that our Supreme Court in *Mely* v. *Morris*, 409 P.2d 979 (Alaska 1966) adopted in large part the rationale of the dissent in *Link* v. *Wabash R.R.*, 370 U.S. 626; 82 S. Ct. 1386; and 8 L. Ed.2d 734 (1962), that the sins of the attorney should not be visited upon his client. See also, *Moore, supra*, pp. 367-371, especially n.47 and accompanying text, pp. 369-371. This issue is not presented in this case since we have no explanation of why opposition was not timely filed, and therefore, are not called upon to determine whether the failure was wilful, or if neglect, whether the neglect was that of plaintiff, plaintiff's counsel or a combination of both.

IT IS THEREFORE ORDERED:

The motion to vacate the order denying the motion to set aside the judgment of dismissal is denied. Defendant is awarded Fifty Dollars ($50.00) attorney's fees for time expended in opposing this motion.

DATED at Anchorage, Alaska, this 31 day of August, 1972.

/s/ JAMES K. SINGLETON, JR.
James K. Singleton, Jr.
Judge of the Superior Court

APPENDIX F

CIVIL RULES

Rule 60. Relief from Judgment or Order.

(b) Mistakes—Inadvertence—Excusable Neglect—Newly Discovered Evidence—Fraud—Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not personally served, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis and audita querela are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

GEORGE A. HAMMOND, *Plaintiff*,

vs.

J. RAY McDERMOTT COMPANY AND
FOSS LAUNCH & TUG COMPANY, *Defendants*

No. A-2-68 Civil

Memorandum to Counsel

The incident out of which this action arose occurred on June 28, 1966. The complaint by which this action was commenced is dated December 29, 1967, and was filed on January 3, 1968. The case has been at issue since March 20, 1968.

The case presently comes before the court on plaintiff's motion to reinstate after the court entered an order of dismissal on September 22, 1971. The order of dismissal was entered on the basis that plaintiff had failed to comply with the court's pre-trial conference order of May 27, 1971, in the following respects:

The order provided for a conference betwen attorneys to be held by counsel for the parties on or before July 2, 1971, at which the following was to be accomplished:

1. Each attorney was to exhibit to the other all documents and things embraced within Rule 34, Federal Rules of Civil Procedure, intended to be offered at trial by each party.

2. Each attorney was to exchange witness lists and state the substance of the testimony of each expert witness expected to be called.

3. Each attorney was to specify to the other his contentions as to the applicable facts and law, and thereafter

discuss the possibilities of admissions or stipulations of fact.

4. Within seven (7) days from the date of the conference between attorneys on July 2, 1971, plaintiff's attorney was to prepare and file a concise statement of each fact admitted in the pleadings and any fact stipulated to at the attorneys' conference.

5. Each party was required to set forth in its pre-trial memorandum a concise statement of each contested issue of fact to be litigated and a concise statement of each contested issue of law to be litigated.

6. A pre-trial memorandum was to be filed by each party at least ten (10) days prior to August 6, 1971, the date scheduled for the pre-trial conference. The notice and order of pre-trial conference explicitly provided that should either counsel or the parties fail to comply timely with the provisions of paragraph 3 thereof, that the court would thereupon enter an order of dismissal, orders of default, or other appropriate orders, without further notice being given.

7. Plaintiff, within ten (10) days after the pre-trial conference to be held on August 6, 1971, was required to submit a pre-trial order reciting the action taken at the pre-trial conference.

The notice and order of pre-trial conference entered on May 27, 1971, specifically provided that any party having a valid reason for being relieved from complying with any provision of the order should, within ten (10) days from the date thereof, set forth such reason or reasons in an ex parte application to be excused therefrom.

The conference between attorneys was held on or about July 2, 1971, and thereafter defendant filed its witness list, pre-trial memorandum, a statement of issues of fact and law to be litigated, and a submission of exhibits to be marked and offered in evidence.

Plaintiff did not file any of the things required by the notice and order of pre-trial conference filed May 27, 1971. Accordingly, the court on August 4, 1971, entered a minute order finding plaintiff in default, and on September 22, 1971, an order of dismissal was entered.

On September 22, 1971, plaintiff filed a motion to reinstate and an affidavit in support thereof which stated that due to the press of other business, plaintiff's attorney inadvertently forgot to fulfill the other pre-trial requirements pursuant to the order of May 27, 1971. On September 22, 1971, plaintiff filed a purported pre-trial memorandum which should have been filed at least ten (10) days prior to August 6, 1971.

Defendants' opposition memorandum to plaintiff's motion to reinstate contends that plaintiff's counsel has not satisfactorily complied with the court's notice and order of pre-trial conference and further asserts that plaintiff's motion and affidavit fail to comply with the requirements of Rule 60(b) of the Federal Rules of Civil Procedure.

The affidavit in support of plaintiff's motion to reinstate filed on September 22, 1971, clearly establishes neglect. However, it sets forth no facts showing that the neglect was excusable or inadvertent. To obtain relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure, a party must make some showing as to why he was justified in failing to avoid mistake or inadvertence. Gross carelessness is not a basis for relief.

The court takes judicial notice of the court's records and files in the following cases insofar as they relate to the mode of conduct and method of operation practiced by plaintiff's counsel for approximately the past two years with reference to failure and refusal to comply with the Federal Rules of Civil Procedure and the rules and order of the court:

Jennings v. Halliburton Equipment Co., No. A-7-71 Civil

Keister v. Houston, No. A-49-67 Civil
Olson v. Firestone Tire & Rubber Co., No. A-63-68 Civil
Braker v. Cook Inlet Tug & Barge, No. A-120-69 Civil
Lochbaum v. McDermott, No. A-5-68 Civil
Farrior v. U.S.A., No. A-40-71 Civil
Newman v. Shell Oil Co., No. A-58-68 Civil
Gillick v. U.S., No. A-58-69 Civil
Asse v. McDermott, No. A-158-68 Civil
Verhoeff v. New England Fish, No. A-60-69 Civil
Chapman v. Kaiser Steel Corp., et al., No. A-146-67 Civil
Neuser v. Shell Oil Co., No. A-148-68 Civil
International Brotherhood of Teamsters v. Frontier Rock & Sand, Inc., No. A-144-68 Civil
Anchorage Sand & Gravel v. Anchorage Lathing & Plastering Co., No. A-134-68 Civil
Meyers v. Ryan Contracting Corp., No. A-151-68 Civil
U.S.A. v. Lessman, No. A-23-69 Civil
Miller v. U.S., No. A-87-69 Civil
Taylor v. McDermott, No. A-97-68 Civil

On the record before the court, plaintiff has failed to show that his present predicament was attributable to anything other than the inexcusable neglect of his counsel in failing and refusing to comply with the Federal Rules of Civil Procedure and the rules and orders of the court.

To unconditionally award plaintiff the relief he presently seeks would reward him for his conduct and lack of diligence, and would make a farce and mockery of the timely compliance and efforts of counsel for defendants.

Accordingly, it is now ORDERED:

1. The order entering plaintiff's default, filed August 4, 1971, is vacated and set aside.

2. The order of dismissal filed September 22, 1971, is vacated and set aside.

3. The case is hereby set for trial by jury at the hour of 10:00 a.m. on Tuesday, May 30, 1972, in Courtroom 1.

4. Exhibits or documents which were not displayed to opposing counsel on or before July 2, 1971, or which were not marked pursuant to Court Rule 9A and filed with the Clerk at least ten (10) days in advance of August 6, 1971, will not be admitted in evidence on the trial of the case.

5. Witnesses, including expert witnesses, whose names do not appear on lists that were exchanged on or before July 2, 1971, will not be permitted to testify on the trial of the case.

6. The issues for trial will be limited to those contested issues of fact and of law that are contained in any pre-trial memorandum which was filed at least ten (10) days in advance of August 6, 1971.

7. The voir dire examinatoin of prospective jurors will be conducted by the court. The court will supplement its examination by asking the prospective jurors such additional questions as it deems proper that are submitted in writing by the parties or their attorneys on or before Wednesday, May 24, 1972.

8. The manner of selection and order of examination of jurors will be in accordance with Rule 15 of the Rules of the United States District Court for the Eastern District of Washingto, a copy of which is attached hereto and by reference incorporated herein.

9. On or before Wednesday, May 24, 1972, counsel for the parties shall file in writing their requests that the court instruct the jury on the law as is set forth in said requests.

Special instructions pertaining to this particular case will not be prepared by the court and counsel are hereby directed to prepare and submit any instructions of this nature which will be requested of the court.

The requested instructions shall be numbered consecutively. They shall indicate which party presents them and shall embrace but one subject. The principle of law embraced in any requested instruction shall not be repeated in subsequent requests. *Each request shall contain a citation of authorties in support of the instruction.* Requests that do not comply with the terms of this order will not be considered by the court.

10. On or before Wednesday, May 24, 1972, each party shall submit to the court in duplicate a brief on all issues of law and evidence other than general routine matters, which the party will assert or urge on the trial of the case. The briefs shall contain a candid, complete, clear and concise statement of reasons in support of each issue of law or evidence together with an adequate citation of authorities.

11. The trial of this case will be conducted in accordance with "Rules Governing Conduct of Trial" which are attached hereto and by reference incorporated herein.

/s/ RAYMOND E. PLUMMLER
United States District Judge

DATED: May 3, 1972